82-1982

NO. _____

Office-Supreme Court, U.S.
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

L. A. STEELE,

Petitioner

V.

ALLEN L. LAMAR,

Respondent

On Petition For Writ of Certiorari
From The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES 42 U.S.C. §1983 REQUIRE AN ACTUAL DEPRIVATION OF RIGHTS OF THE COMPLAINING PARTY IN ORDER TO ESTABLISH A BASIS FOR RELIEF FOR DENIAL OF ACCESS TO THE COURT?

II. DO THE FEDERAL RULES OF EVIDENCE RELATING TO HEARSAY REQUIRE THE EXCLUSION OF HIGHLY PREJUDICIAL TESTIMONY BY PLAINTIFF CONCERNING STATEMENTS OF A DECEASED THIRD PARTY REGARDING DEFENDANT ABSENT A PRINCIPLE/AGENT RELATIONSHIP?

PARTIES

Petitioner is L. A. Steele, the defendant in the district court.

Respondent is Allen Lamar, the plaintiff in the district court.

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IN THE
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L. A. STEELE,

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V.

ALLEN L. LAMAR,

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On Petition For Writ of Certiorari
From The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on December 14, 1982, rehearing *en banc* denied February 28, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 693 F.2d 558, *reh. denied*, 698 F.2d 1286 (5th Cir. 1983)(Ap-

pendices A and B). The order of the United States Magistrate is appears as Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 14, 1982. A timely filed petition for rehearing *en banc* was denied subject to clarification on February 28, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

This action was initially brought by Plaintiff *pro se* on July 27, 1976, alleging that the Defendant had retaliated against him for filing lawsuits during his in-

carceration on the Ellis Unit of the Texas Department of Corrections. The Plaintiff has been represented by appointed counsel since shortly after suit was filed. The case was tried to a jury with a United States Magistrate presiding at the trial. Prior to the commencement of trial, Defendant submitted two motions in limine (ROA at 172 & 208; 217). Both sought exclusion of testimony by Bertrand Jerome Bennett of "other acts by Defendant similar" to acts complained of by Plaintiff and testimony concerning statements made by Lawrence Smith, an inmate who was deceased at the time of trial. Both were denied by the Magistrate during the course of trial.

At the close of evidence and following return of the jury verdict, the court orally granted Defendant's motion for judgment, informed Plaintiff that he had a right to appeal, and informed Plaintiff's counsel that a motion for new trial would be considered (T. 461; 467-468). On December 17, 1980, the Magistrate denied Defendant's Motion for Judgment on the Verdict and granted the conditional Motion for Judgment on the Verdict filed by Plaintiff. Judgment was entered on December 17, 1980, and the Defendant filed Motion for New Trial on December 24, 1980. On January 7, 1981, Defendant's Motion for New Trial was denied. The Defendant filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on January 30, 1082; the Plaintiff filed Notice of Appeal on February 9, 1981. The opinion of the panel was issued December 14, 1982. Defendant filed a timely Suggestion for Rehearing *En Banc* which was denied February 28, 1983.

B. Statement of Facts

The Plaintiff was incarcerated at the Texas Department of Corrections from 1968 to 1979. During the period of 1975-1976, the Plaintiff was assigned to the

Ellis Unit where the Defendant was employed as a Building Major.

The Plaintiff filed numerous lawsuits while at the Texas Department of Corrections, both on behalf of himself and of other inmates. As a result of these lawsuits, the Plaintiff alleges that he was harassed, threatened and intimidated by the Defendant. The Plaintiff's claim is based upon several isolated, independent incidents in which the Defendant allegedly (1) threatened Plaintiff, (2) had other inmates threaten Plaintiff, and (3) attempted to induce an inmate to stab the Plaintiff. Plaintiff testified concerning remarks attributed to a deceased inmate to bolster his claim of retaliation.[1] The Defendant denied all of the allegations, and raised the affirmative defense of qualified good faith immunity.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT WHICH REQUIRE AN ACTUAL DEPRIVATION OF CONSTITUTIONAL RIGHTS IN ORDER TO GIVE RISE TO A CLAIM UNDER 42 U.S.C. §1983.

The cornerstone of 42 U.S.C. §1983 is the requirement that an act which results in a *deprivation* gives rise to

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1. Testimony at trial by Plaintiff was as follows:

A (by Plaintiff): "I was coming from the shower and he [Lawrence Smith] came into D-15-89 where I lived and two inmates told me (Johnny Martinez and James Yaeger) told me that Lawrence Smith had sent word to me that Major Steele had told him—" (T. 88).

A (by Plaintiff): "So when I heard it I went back to the—I got it from two inmates who got it from him [Lawrence Smith] personally—. . . " (T. 89).

liability. Section 1983 provides that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . *to the deprivation* of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to *the party injured* in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983. As this Court has stated the requirement: "The first inquiry in any §1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'. If there has been no such deprivation, the state of mind of the defendant is wholly immaterial." *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

Both the Magistrate at trial and the Court of Appeals have failed to give effect to this fundamental requirement. In the interrogatories submitted to the jury by the Magistrate, the jury was asked whether defendant "intentionally engaged in conduct calculated" to retaliate against Plaintiff for participating in lawsuits, to threaten punishment for Plaintiff's participation or to discourage Plaintiff's participation in lawsuits.[2] The Magistrate as a threshold matter required the jury to focus solely on the intent of the defendant and not on the existence of a deprivation.[3] This was prejudicial error. "If there has been no such deprivation, the state of

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2. The special interrogatories submitted to the jury are set out in *Lamar v. Steele*, footnote 4 of Appendix A to this brief.

3. The second jury interrogatory asked whether Plaintiff suffered any injury as a result of any action by Defendant. The jury answered no. This answer is consistent with Plaintiff's testimony that Defendant's alleged action had no effect. Plaintiff continued to file claims, had filed approximately 100 suits and had even kept Defendant up all night notarizing legal documents.

mind of the defendant is wholly immaterial." *Baker v. McCollan, supra.*

The Court of Appeals held that both the mental state of the Defendant and the perception of the Plaintiff are immaterial to consideration whether Plaintiff is entitled to recover for denial of access to the courts. Further, the panel stated that the outcome of Defendant's attempted misconduct is irrelevant. The panel found that:

> The right of access may be tortiously impinged by threats, in turn triggered by efforts at court access. *Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972). The mental processes of the state actor is [sic] immaterial to this analysis.
>
> The prisoner's reaction to the threats is likewise immaterial. It is not necessary to show that the prisoner succumbed to the threats as a predicate for securing §1983 relief. *Hudspeth v. Figgins*, 584 F.2d 1345 (4th Cir. 1978).

Lamar v. Steel, supra. (Appendix A). The panel has determined that because Defendant may have "engaged in conduct calculated either to punish, to threaten to punish Lamar for his involvement in past lawsuits, or to discourage his participation in future litigation," Lamar is entitled to a judgment of liability despite the fact that Lamar did not identify a single pleading he was deterred from filing and, in fact, testified that he was not intimidated, frightened or discouraged. The jury specifically found that he was not injured.

This holding conflicts with *Baker v. McCollan* in that it effectively eliminates the deprivation requirement and creates an inchoate violation in which an attempt equals an actual deprivation irrespective of how unsuccessful and how limited. If such reasoning were used in the area

of arrests, an officer who went to a bar for the express purpose of arresting a specific individual for personal reasons without probable cause would be liable to that individual if the individual were not at the bar and was never detained or arrested. This result imposes liability broader than that imposed by ordinary tort law and "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Parratt v. Taylor*, 451 U.S. 527 (1981).

The Court of Appeals imposed liability here because "[T]he contrary rule would result in the anomaly of protecting only those individuals who remain out of court." *Lamar v. Steele*, 693 F.2d at 562. (Appendix A). Thus, the court seeks to benefit those who have suffered no injury because some unidentifiable individuals who may have been injured may be to timid to assert their own rights. This result is contrary to the express language of §1983 which creates a cause of action only for the "party injured" by misconduct.

Further, it forces the court and parties to deal in abstractions. Such an abstraction is an insufficient basis for liability under §1983. *See, Rhodes v. Chapman*, _____U.S._____, 101 S.Ct. 2392, 2409 (1981)(emphasis in original)(Brennan, J. concurring). "The District Court may well be correct *in the abstract* that prison overcrowding and doublecelling such as existed at the Southern Ohio Correctional Facility generally results in serious harm to the inmates. But cases are not decided in the abstract. A court is under the obligation to examine the *actual effect* of challenged conditions upon the well being of prisoners." A court is also under an obligation to deal with the rights of the parties actually before it.

II. THE DECISION OF THE COURT OF APPEALS IGNORES THE REALITIES OF THE PRISON ENVIRONMENT. IN A PRISON ENVIRONMENT, MERE WORDS WHICH DO NOT AFFECT PLAINTIFF'S ACTION OR PERCEPTION ARE NOT COGNIZABLE UNDER §1983.

The courts have repeatedly recognized that the prison environment is, by virtue of the people confined in prisons, an extremely hostile and dangerous environment. *See Bell v. Wolfish*, 441 U.S. 520 (1979).

> State penitentiaries are occupied by convicted felons, either ineligible for or found to be unworthy of probation. By its very nature, the operation of such a prison is a dangerous undertaking. Time and time again, experience has dramatically taught that the management and control of prisoners, the prevention of mass violence within prisons, and the safe retention of convicts within prison walls, present problems of the first magnitude, in which failures occur all too often.

Newman v. Alabama, 559 F.2d 283, 287 (5th Cir. 1977). "The management by a few guards of large numbers of prisoners, not the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973). It may also necessitate the use of harsh, profane or facially threatening language. Such harsh or facially threatening language that has no effect and is not taken seriously by the recipient should not be held to constitute a deprivation. Clearly verbal abuse alone—including racial invective and threats—does not rise to the level of a constitutional tort. *Collins v. Cundy*, 603 F.2d 825 (10th Cir. 1979); *Arroyo v. Schaefer*, 548

F.2d 47 (2d Cir. 1977); *Ellingburg v. Lucas*, 518 F.2d 1196 (8th Cir. 1975).

In this case the disregard shown by the Court of Appeals for the dangerous nature of the prison environment is compounded by the Court's holding that third hand statements by one inmate to another may be used against a prison official to establish liability. Ironically, the jury's finding that Defendant engaged in conduct calculated to deter Plaintiff from filing lawsuits may well be predicated on Plaintiff's testimony that Lawrence Smith, a fellow inmate who was deceased at the time of trial, had told him that Steele had threatened to harm Lamar if he continued to file law suits. *Lamar v. Steele*, *supra*. (Appendix A). The panel found such testimony proper as merely proving "the fact of the assertion, not the truth of the assertion." This finding is difficult to comprehend. If the testimony is not offered to prove the truth of the assertion that Steele made such a threat, it is both irrelevant and highly prejudicial. Steele is made responsible for the remarks of third parties over whom he has no control in an environment in which inmates frequently attempt to secure prestige and advantages by claiming official connections and sanctions which do not exist. *Jones v. North Carolina Prisoner's Labor Union, Inc.*, 433 U.S. 119 (1977). Such responsibility exceeds that which may be imposed in a negligence action under a theory of respondeat superior. It encourages manufacturing evidence in a population all too prone to do so.

III. DEFINITION OF THE FACTS WHICH MUST BE ESTABLISHED TO GIVE RISE TO A CLAIM OF DENIAL OF ACCESS TO THE COURT IS IMPORTANT AND WORTHY OF DECISION.

This Court has frequently observed the importance of inmates' right of access to the courts. *See, Bounds v.*

Smith, 430 U.S. 817 (1977); *Johnson v. Avery*, 393 U.S. 483 (1969); *Burns v. Ohio*, 360 U.S. 252 (1959). The Court has provided the lower federal courts and concerned parties with substantial guidance on the scope of this right in the context of filing and docketing appeals in *Burns v. Ohio*; mutual inmate assistance in *Avery*; and availability of law books and related material in *Bounds v. Smith*. This Court has not addressed the nature of the conduct and injury necessary to establish a deprivation of access as a result of retaliation or harassment. Defendant submits that at a minimum, a denial of access to the courts should require some showing that Defendants' challenged action caused some actual deprivation, if only momentary hesitation on Plaintiff's part, as a result of apprehension.

Such guidance would be beneficial to the lower court and the parties. Given the high level of legal activity in the state prisons, the issue of access to the courts is likely to recur frequently in all the Circuits. This is therefore exactly the sort of issue which this Court has historically addressed.[4]

CONCLUSION

For these reasons, Petitioner prays that the petition for writ of certiorari be granted and the judgment of the Court of Appeals be reversed.

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4. The Fifth Circuit's holdings regarding the matters at issue in this Petition have already been used to the detriment of Defendants in subsequent jury trials. The harm to Defendants caused by the erroneous standard is neither speculative nor abstract.

Respectfully submitted,

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Allen L. LAMAR, Plaintiff-Appellee Cross-Appellant,

v.

L.A. STEELE, Defendant-Appellant Cross-Appellee.

No. 81-2045.

United States Court of Appeals, Fifth Circuit.

Dec. 14, 1982.

Inmate at state correctional institution brought civil rights suit against a building major at the institution alleging denial of access to the courts. Following a jury trial under the guidance of Federal Magistrate, Calvin Botley, the United States District Court for the Southern District of Texas entered judgment in favor of the inmate for nominal damages, and the building major appealed and the inmate cross-appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) inmate's testimony that a fellow inmate, who was deceased at time of trial, told him that the building major had threatened to harm the inmate if he continued to file lawsuits on behalf of other inmates did not constitute objectionable hearsay; (2) testimony of a fellow inmate that the building major had given him a knife and asked him to kill a third inmate was admissible under the plan or motive exception to the rule proscribing admission of character evidence; (3) inmate was not required to establish that the building major acted intentionally or wantonly in order to recover damages; and (4) inmate was not required to show that he succumbed to the building major's threats as a predicate for securing relief.

Affirmed in part, reversed in part, and remanded.

1. Civil Rights —13.13(2)

In civil rights suit brought by inmate of state correctional institution alleging denial of access to the courts, the inmate's testimony that a fellow inmate, who was deceased at the time of trial, told him that the building major had threatened to harm the inmate if he continued to file lawsuits on behalf of other inmates did not constitute objectionable hearsay. 42 U.S.C.A. § 1983.

2. Civil Rights —13.13(2)

In civil rights suit brought by inmate of state correctional institution against a building major at the institution alleging denial of access to the courts, testimony of a fellow inmate that the building major had given him a knife and asked him to kill a third inmate was admissible under the plan or motive exception to the rule proscribing admission of character evidence. 42 U.S.C.A. § 1983; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

3. Civil Rights —13.13(1)

Inmate of state correctional institution, who brought civil rights suit against a building major at the institution alleging denial of access to the courts, was not required to establish that the building major acted intentionally or wantonly in order to recover damages. 42 U.S.C.A. § 1983.

4. Torts —3

Right of judicial access may be tortiously impinged by threats, in turn triggered by efforts at court access.

5. Civil Rights —13.13(1)

Inmate at state correctional institution, who brought civil rights suit against a building major at the institu-

tion alleging denial of access to the courts, was not required to show that he succumbed to the building major's threats as a predicate for securing relief. 42 U.S.C.A. § 1983.

6. Civil Rights —13.17

In suits alleging deprivation of civil rights under color of law, the failure of proof of compensatory damages does not necessarily preclude an award of punitive damages and attorney fees. 42 U.S.C.A. § 1983.

Appeals from the United States District Court for the Southern District of Texas.

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

Allen L. Lamar, a prisoner in the Ellis Unit of the Texas Department of Corrections (TDC) from 1968 to 1979[1] invoked 42 U.S.C. § 1983 in a suit against Len Arthur Steele, a building major at the Ellis Unit, claiming that Steele denied him access to the courts. A jury, functioning under the guidance of a federal magistrate, returned a verdict on special interrogatories. The trial court ultimately entered judgment in favor of Lamar for

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1. In 1979, Lamar and the other TDC inmates who testified or were otherwise involved in *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.1982), major litigation involving Texas prisons, were transferred to a federal prison.

$1 in nominal damages, denied punitive damages and, after remand, awarded attorney's fees and costs.[2] Ellis appeals; Lamar cross-appeals. For reasons assigned, we affirm in part, reverse in part, and remand.

Lamar was active as a "writ writer," a person who assists fellow inmates in preparing petitions seeking various forms of judicial relief ranging from applications for habeas relief to suits for injunction and money judgments against state officials, employees, the state, and its agencies. Lamar also filed scores of class action suits challenging various prison practices and conditions.[3] Steele manifested a distaste for Lamar's activities. Lamar alleged and offered proof that Steele: (1) burned his legal documents, (2) asked one inmate to assault him, (3) asked another to kill him, (4) invited him to pick up and attempt to use a small knife while he (Steele) held a substantial hunting knife in his hand out of view, and (5) promised to send him home "in a pine box."

Evidentiary Rulings

Steele claims that the magistrate erred in admitting: (1) Lamar's testimony that Lawrence Smith, a fellow inmate who was deceased at the time of trial, had told him that Steele had threatened to harm Lamar if he continued to file law suits, and (2) the testimony of Bertrand Bennett that Steele had given him a knife and asked him to kill a "writ writer" named Clyde Sewell. Steele ob-

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2. The magistrate initially deferred the award of attorney's fees. After remand, Lamar recovered judgment against Steele for attorney's fees and litigation costs totaling $7,992.33.

3. These suits were usually unsuccessful. Notable exceptions included two suits focusing on racial discrimination in parole criteria and prison employment which resulted in judgments in favor of the prisoners.

jected to the first as hearsay and the second as inadmissible character evidence.

[1] The hearsay objection is not well-taken. The Smith statement was offered as evidence that Smith had made the statement; it was offered to prove the fact of the assertion, not the truth of the assertion. As such it is not proscribed hearsay. The fact of the assertion is relevant to the question of threats, intimidation and harassment as they would relate to impeding access to the courts.

[2] As to Bennett's testimony, we are guided by Rule 404(b), Federal Rules of Evidence. This rule permits introduction of what otherwise might be inadmissible character evidence when it is found to be relevant to the issue of plan or motive. To qualify under this exception, the conduct tendered must be sufficiently similar to the act under inquiry to minimize any doubt that the two are products of the same mind. McCormick, *Evidence* § 157 (1954). The more idiosyncratic the less doubt, and, concommitantly, the greater the probative value. 2 Weinstein *Evidence* § 404[16], p. 404-92. From this vantage we perceive a similarity unto a mirror image between the conduct of Steele, Bennett and "writ writer" Sewell and Steele's conduct with the prisoner Ronald Frank who was invited to kill "writ writer" Lamar. The plan criterion of Rule 404(b) is satisfied. *United States v. Maestas*, 546 F.2d 1177 (5th Cir. 1977). In addition, Steele's comments to Bennett bear relevance to the issue of notice. Steele's desire to purge the prison of writ writing furnished a reason for the acts of which Lamar complained. We find no abuse of discretion in the allowance of this evidence. *United States v. Benton*, 637 F.2d 1052 (5th Cir.1981).

Interrogatories

[3,4] In his cross-appeal Lamar challenges the interrogatories[4] posed to the jury. He maintains that the language used was confusing and incorrectly reflected controlling law. We agree. The interrogatories submitted by the magistrate permitted the jury's consideration of damages only if it found that the defendant acted both intentionally and wantonly. Since neither mental state is required to establish a violation of the right of judicial access, these interrogatories imposed on Lamar an inappropriate burden. *Navarette v. Enomoto,* 536 F.2d 277 (9th Cir.1976), *McCray v. Maryland,* 456 F.2d 1 (4th Cir.1972). The right of access may be tortiously impinged by threats, in turn triggered by efforts at court access. *Campbell v. Beto,* 460 F.2d 765 (5th Cir.1972). The mental processes of the state actor is immaterial to this analysis.

[5] The prisoner's reaction to the threats is likewise immaterial. It is not necessary to show that the prisoner succumbed to the threats as a predicate for securing § 1983 relief. *Hudspeth v. Figgins,* 584 F.2d 1345 (4th Cir.1978). The contrary rule would result in the anomaly of protecting only those individuals who remain out of court.

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4. SPECIAL INTERROGATORY NUMBER 1

Do you find from a preponderance of the evidence that during Allen L. Lamar's confinement in the Ellis Unit of the Texas Department of Corrections in 1975 or 1976 that Defendant L.A. Steele, while acting under color of law of the State of Texas, intentionally engaged in conduct calculated toward any of the following ends:

(1) To punish or retaliate against Allen L. Lamar for participating in lawsuits against officials of the Texas Department of Corrections?

(2) To threaten punishment or retaliation against Plaintiff Allen L. Lamar for participating in lawsuits against officials of the Texas Department of Corrections?

OR

footnote continued on following page

We reject the suggestion that Steele's conduct was only that of a zealous prison official and merely reflected an innocuous attempt at guiding future activities of the prisoners. To the contrary, Steele's actions constituted punishment for Lamar's past activities and intimidation aimed at his future activities, all of which implicated the first amendment's protections of free speech and right of petition. The conduct laid at Steele's door was a flagrant disregard of these constitutional rights. Occurrences after these threats were made were of no moment. *Hooks v. Kelley,* 463 F.2d 1210 (5th Cir.1972).

As reflected in their answer to the first Interrogatory, the jurors found that Steele intentionally engaged in conduct calculated either to punish, to threaten to punish Lamar for his involvement in past lawsuits, or to discourage his participation in future litigation. This is a finding of an actionable deprivation of the protected right of access. This issue is thus foreclosed. The liability of Steele is affirmed.

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footnote continued from previous page

(3) To discourage Allen L. Lamar from participating in lawsuits against officials of the Texas Department of Corrections?

ANSWER: "We do" or "We do not" _____

SPECIAL INTERROGATORY NUMBER 2

Do you find from a preponderance of the evidence that during Plaintiff Allen L. Lamar's confinement in the Ellis Unit of the Texas Department of Corrections Defendant L.A. Steele unnecessarily and wantonly inflicted emotional distress on the Plaintiff Allen L. Lamar?

ANSWER: "We do" or "We do not" _____

If you have answered "We do" to Special Interrogatories Numbers 1 and 2, then answer Special Interrogatory Number 3.

SPECIAL INTERROGATORY NUMBER 3

Do you find from a preponderance of the evidence that, in connection with the occurences made the basis of this lawsuit, defendant L.A. Steele acted in good faith?

ANSWER: "We do" or "We do not" _____

footnote continued on following page

Damages

The jury did not assess damages; the instructions restrained consideration of that issue unless the jurors found Steele's conduct intentional and that he "unnecessarily and wantonly inflicted emotional distress on ... Lamar." In post-verdict motions, the magistrate awarded $1 as nominal damages for the constitutional deprivation. A jury should first address the issue of damages, acting pursuant to proper instructions.

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footnote continued from previous page

You are instructed that Defendant L.A. Steele did not act in "good faith" if he reasonably should have known that his actions would violate the rights of Plaintiff Allen L. Lamar.

SPECIAL INTERROGATORY NUMBER 4

If you have answered Special Interrogatories Numbers 1 and 2 "We do," then and only then, answer Special Interrogatory Number 4.

What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate Allen L. Lamar for the injury, deprivation of rights, or infliction of emotional distress which you find from a preponderance of the evidence resulted from the conduct of Defendant L.A. Steele?

ANSWER: $ _____

If you have answered Special Interrogatories Numbers 1, 2, "We do," then and only them, answer Special Interrogatory Number 5.

SPECIAL INTERROGATORY NUMBER 5

Do you find from the preponderance of the evidence that the conduct of Defendant L.A. Steele against Plaintiff Allen L. Lamar was either (1) malicious or (2) willful?

ANSWER: "We do" or "We do not" _____

If you have answered Special Interrogatories Numbers 1, 2 and 5 "We do," and only in that event, answer Special Interrogatory Number 6.

SPECIAL INTERROGATORY NUMBER 6

What amount of money, if paid now in dollars and cents, do you find from a preponderance of the evidence should be awarded against Defendant L.A. Steele as punitive damages?

ANSWER: $ _____

You are instructed that an award of exemplary damages is made in order to deter the Defendant and others from engaging in similar conduct in the future.

[6] In *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), the Supreme Court held that in some due process cases § 1983 plaintiffs must prove actual damages. It remains for the trial court to determine the effect of this teaching on Lamar's claim. In this regard we note that the failure of proof of compensatory damages does not necessarily preclude an award of punitve damages and attorney's fees. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir.1982). The award of attorney's fees, for services rendered prior to the notices of appeal, is affirmed. In due course the trial court is to award an appropriate amount of attorney's fees for this appeal and for the proceedings on remand. The judgment awarding only nominal compensatory damages and denying punitive damages is reversed and remanded for reconsideration.

Attorney's Fees

The magistrate correctly declined to assess attorney's fees against the Texas Department of Corrections. The instant suit is brought against Steele, individually. The state is not a party, and the state's treasury is not vulnerable to an attorney's fee award in an instance as is here presented.

The judgment of the trial court, insofar as it relates to Steele's liability and the award of attorney's fees, is AFFIRMED. The judgment as it relates to damages is REVERSED and REMANDED for further proceedings consistent herewith.

Allen L. LAMAR, Petitioner-Appellee Cross-Appellant,

v.

L.A. STEELE, Respondent-Appellant Cross-Appellee.

No. 81-2045.

United States Court of Appeals, Fifth Circuit.

Feb. 28, 1983.

Inmate at state correctional institution brought civil rights suit against building major at institution alleging denial of access to courts. Following a jury trial under the guidance of Federal Magistrate Calvin Botley, the United States District Court for the Southern District of Texas entered judgment in favor of the inmate for nominal damages, and the building major appealed. The inmate cross appealed. The Court of Appeals, 693 F.2d 559, affirmed in part, reversed in part, and remanded. In denying motion for rehearing en banc, the Court of Appeals held that claim under Section 1983 of Civil Rights Acts of 1871 only accrued when threats or threatening conduct resulted in constitutional deprivation; thus, cause of action was not based on threats alone.

Motion for rehearing denied.

Civil Rights —13.4(1)

Where claim under Section 1983 of Civil Rights Act of 1871 only accrued when threats or threatening conduct resulted in constitutional deprivation, cause of action was not improperly based on threats alone. 42 U.S.C.A. § 1983.

Appeals from the United States District Court for the Southern District of Texas.

ON SUGGESTION FOR REHEARING
EN BANC

(Opinion Dec. 14, 1982, 5 Cir., 1982,
693 F.2d 559).

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

The application for rehearing complains that our opinion would allow a 42 U.S.C. § 1983 cause of action to be based on "mere words" or "idle threats." This reflects a misperception of our holding. Threats alone are not enough. A section 1983 claim only accrues when the threats or threatening conduct result in a constitutional deprivation.

Subject to this explanation, and treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor judge in regular active service of this court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALLEN L. LAMAR	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. 76-H-1255
L.A. STEELE,	§	
Defendant	§	

FINAL JUDGMENT

This action came on for trial before the Court and a jury, Honorable Calvin Botley, United States Magistrate, presiding, pursuant to Title 28, United States Code, Section 636, and the issues having been duly tried and the jury having duly rendered its verdict.

It is ORDERED and ADJUDGED that the Plaintiff Allen L. Lamar recover of the Defendant L.A. Steele the sum of One Dollar ($1.00), and his costs of action.

DONE at Houston, Texas, this the 17th day of December, 1980.

/s/

Calvin Botley
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALLEN L. LAMAR	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. 76-H-1255
L.A. STEELE,	§	
Defendant	§	

MEMORANDUM AND OPINION

The Plaintiff, confined in the Texas Department of Corrections (TDC) during the time this cause of action arose, filed a pro se complaint pursuant to 42 USC §1983 alleging that the Defendant, the building major at the Ellis Unit, violated his constitutional right of access to the courts by threatening, harrassing and initimating him because he filed numerous federal civil rights lawsuits against the prison system challenging the constitutionality of prison practices and conditions of confinement.

The case was tried to a jury November 10-14, 1980. The jury's verdict found that the Defendant did commit the act or acts complained of, but found no injury as the result thereof, and consequently did not award any damages.

Based on the verdict, each party moved the court for the entry of judgment in his favor; the Plaintiff contending that since the jury found a violation of his civil rights, he is entitled to judgment and nominal damages; and the Defendant contending that since no injury was found by the jury, there were no actual consequences of the act of Defendant, therefore there cannot be recovery.

Civil actions brought under Section 1983 are federal constitutional tort actions, redressable against persons acting under color of state law for the violation of a right secured to citizens under the laws or constitution of the United States. Therefore, the disposition of legal damage claims are ordinarily considered against the backdrop of the principles of tort liability. Congress intended to create a species of tort liability in favor of persons who are deprived of rights, privileges, or immunites secured to them by the Constitution, *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, and any recovery should be predicated upon the recovery principles provided under the common law of torts. Specifically, a constitutional tort is actionable under §1983 upon a finding that: (1) a constitutional right is infringed (2) there was injury to the Plaintiff (3) that the person causing the injury was acting under color of state law.

Two of the cardinal principals of recovery in tort law are the principles of causation and compensation for the injury caused by the Defendant's acts. The Defendant urges that since his acts caused no injury, there is nothing to compensate. The threshhold question then is must a Plaintiff prove he was actually injured by the deprivation before he can recover under §1983?

Some federal courts have approved the award of nominal damages under §1983 where deprivations of constitutional rights are not show to have caused actual injury. *Thompson v. Burke*, 556 F.2d 231 (3d Cir. 1977); *United States v. ex rel Tyrrell v. Speaker*, 535 F.2d 823 (3d Cir. 1976); *Magnett v. Pelletier*, 488 F.2d 33 (1st Cir. 1973); *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); *Bell v. Gayle*, 384 F. Supp. 1022 (N.D. Tex. 1974)'*Craig v. Carson*, 449 F. Supp. 385 (M.D. Fla. 1978).

The Supreme Court considered this question in *Carey v. Piphus*, 98 S.Ct. 1042 (1978) which involved an Illinois

school principal's suspension of pupils for twenty (20) days without a due process hearing for smoking marijuana on the school grounds. The district court found that the students were denied due process. The Plaintiffs did not submit any proof of injury and the court therefore found no actual injury and did not award any damages. The Seventh Circuit reversed and remanded the case indicating that even though no actual damage was proven, the violation of civil rights should be compensated by substantial non-punitive damages. The Supreme Court granted certiorari to consider whether, in an action under §1983 for the deprivation of a fundamental constitutional right, a plaintiff must prove he was actually injured by the deprivation before he may recover substantial non-punitive damages. The Supreme Court held that the denial of procedural due process is actionable for nominal damages without any proof of actual injury because the right of due process is "absolute" and does not depend upon the merits of the claimant's assertions, and because of the importance to organized society that those rights be scrupulously observed.

The Supreme Court in its decision reasoned that although §1983 is a constitutional tort statute and ordinarily should be considered in accordance with principles of common law tort, not every constitutional tort will comport with the trilogy of tort principles, i.e., the requirements of proof of injury, since voting rights actions, for example, do not require proof of injury. Also, the court noted that not all constitutional rights are "fundamental or absolute" rights. Therefore, two important elements to be considered are (1) the nature of the right in question and (2) the interest protected by the particular constitutional right.

The case before this jury involved allegations of the denial of the Plaintiff's right of access to the courts. The right of access to the courts is based firmly

in every citizen's right of redress of grievances set forth in the First Amendment. Without access to the courts there can be no redress of grievances. Such a right is as fundamental as the right of due process as set forth in the Fifth and Fourteenth Amendments. See *Johnson v. Avery,* 393 U.S. 483, 89 S. Ct. 747 (1969); *Corpus v. Estelle,* 551 F.2d 68 (5th Cir. 1977). Consequently, adhering to the Supreme Courts' decision in *Carey v. Piphus,* supra, the jury finding that the Defendant violated the Plaintiff's right of access to the courts entitles Plaintiff to recover nominal damages without proof of actual injury in an amount not to exceed $1.00 from Defendant.

Plaintiff has requested an award of attorney fees, to which he is entitled under the Civil Rights Attorney Fees Act, 42 U.S.C. §1983, as a prevailing party, only to the extent that he demonstrates the necessary twelve (12) factors for determining an award of attorney fees as set forth in this circuit in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), *Wolf v. Frank,* 555 F.2d 1213 (5th Cir. 1977), and *Rainey v. Jackson State College,* 551 F.2d 672 (5th Cir. 1977). The Court will require documentation, affidavits, and a memorandum by Plaintiff in support of his request for attorneys fees before any award is made.

Accordingly, judgment shall be entered for the Plaintiff.

The Clerk shall file this Memorandum and Opinion and provide all parties with true copies.

DONE at Houston, Texas, this 17th day of December, 1980.

/s/

Calvin Botley
United States Magistrate

Office-Supreme Court, U.S.
FILED
JUL 11 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1962

In The

Supreme Court of The United States

October Term, 1982

L. A. STEELE,

Petitioner,

vs.

ALLEN L. LAMAR,

Respondent.

On Petition For Writ of Certiorari
From The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 82-1962

In The

Supreme Court of The United States

October Term, 1982

L. A. STEELE,

Petitioner,

vs.

ALLEN L. LAMAR,

Respondent.

On Petition For Writ of Certiorari
From The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I. **IS A DEPRIVATION OF THE RIGHT OF ACCESS TO THE COURTS ESTABLISHED BY A SHOWING THAT STATE OFFICIALS HAVE ENGAGED IN CONDUCT CALCULATED TO HARASS AN INMATE FOR HAVING MADE RESORT TO THE COURTS, EVEN WHEN SUCH HARASSMENT DOES NOT DETER THE INMATE FROM CONTINUING TO ENGAGE IN LITIGATION ACTIVITIES?**

II. SHOULD THIS COURT CURTAIL THE LEGITIMATE SCOPE CURRENTLY GIVEN IN LOWER COURTS TO FEDERAL RULES OF EVIDENCE 804(b)(3), 803(24), AND 404(b)?

OPINION BELOW

The opinion of the Court of Appeals is reported at 693 F.2d 558, *reh. denied*, 698 F.2d 1286 (5th Cir. 1983) (Appendices A and B of the Petition). The order of the trial court appears at Appendix C of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTE INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ."

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

This case is a suit for damages based on 42 U.S.C. §§1983, *et. seq.* Lamar was an inmate confined in the Texas Department of Corrections (TDC) at the time the cause of action arose, and Steele was an employee of TDC at that time. Lamar alleged that Steele, acting under color

of state law, engaged in various sorts of conduct calculated to retaliate against Lamar for having filed and otherwise participated in lawsuits against TDC personnel, to punish Lamar for having filed and participated in such litigation, and to attempt to deter him from continuing his prosecution and/or participation in such litigation in the future.

The case was tried to a jury, which in answer to the first special interrogatory, found that Steele had engaged in conduct calculated toward either (1) Punishing Lamar's resort to access to the courts, (2) threatening such punishment, or (3) discouraging him from participating in such litigation. (R. 250). However, in response to Special interrogatory Number two, the jury answered negatively when asked whether Steele had "unnecessarily and wantonly inflicted emotional distress on the plaintiff Allen L. Lamar." (R. 250, 251).

The court, over objection from Lamar, had conditioned or predicated the interrogatories so that the jury was instructed not to answer any of the remaining interrogatories, including those on actual and exemplary damages, unless they had responded affirmatively to both special interrogatories numbers *one* and *two*. (R. 251, 252). Consequently, the jury did not answer any of the other four special interrogatories submitted, including those on actual and exemplary damages; the court accepted the verdict. (T. 467).

On December 17, 1980, the trial court denied the motion for judgment of Steele and granted Lamar's conditional motion for judgment on the verdict (conditioned on non-waiver of errors made in connection with the con-

ditioning of the special interrogatories, as discussed above). This judgment grants judgment against Steele in favor of Lamar for one dollar. (R. 306). Later, the trial court awarded attorneys' fees to Lamar.

Steele filed notice of appeal. (R. 409). Later, Lamar filed notice of appeal. (R. 413).

The opinion of the Fifth Circuit panel was issued December 14, 1982. The Court of Appeals affirmed the judgment as to liability, finding a deprivation of the right of access to the courts, and remanded for a new trial solely on the issues of actual and exemplary damages. Petitioner filed a timely Suggestion for Rehearing *En Banc*. It was treated also as a Motion for Panel Rehearing and was denied on February 28, 1983.

B. *Statement of Facts*

Lamar was incarcerated at the TDC Ellis Unit from 1968 to 1979. In support of his contentions, Lamar presented evidence that Steele, in retaliation against Lamar's having resorted to access to the courts, (1) caused Lamar's legal materials to be burned (T. 208-215); (2) caused another inmate to threaten bodily injury to Lamar if Lamar did not cease his litigation activities (T. 88-90); (3) threatened Lamar by stating that if he (Lamar) did not pack up all of his legal materials and get rid of them, he (Steele) would "send Lamar home in a pine box." (T. 66, 68); (4) "invited" Lamar to attempt to stab Steele while Steele himself was armed with a large knife (T. 51, 52); and, (5) asked another inmate to stab Lamar (T. 182-185). Lamar did not cease his litigation activities in response to this conduct of Steele.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioner claims that the decision below conflicts with this Court's decision in *Baker v. McCollan*, 443 U.S. 137 (1979). Petitioner fastens upon the following language in *Baker*.

> The first inquiry in any §1983 suit, therefore is whether the plaintiff has been deprived of a right "secured by the Constitution and laws." If there has been no deprivation, the state of mind of the defendant is wholly immaterial.

443 U.S. at 140.

Petitioner utilizes the above language for the proposition that there cannot be a §1983 violation unless threats made by the state actor actually succeed in causing the inmate to cease litigation activities.

Baker v. McCollan involved a claim of false imprisonment, which under the facts of that case was a state law cause of action in the guise of a constitutional violation. The issue here, however, is not one of the state tort law, but concerns the right of access to the courts, a fundamental constitutional right. *Bounds v. Smith*, 430 U.S. 817, 838 (1977).

By citing *Baker v. McCollan*, Petitioner merely begs the question of whether an "actual" deprivation must take place before an §1983 action accrues. *Baker v. McCollan* does not determine under what circumstances an "actual" deprivation takes place; it holds only that the

deprivation alleged was not of a right "secured by the Constitution and laws."

This Court has already held, in effect, that a violation of the right of access to the courts does not necessarily require that an inmate be induced to cease litigation activities. In *Johnson v. Avery*, 393 U.S. 483, 485 (1969), this Court stated that the right of access "may not be denied *or obstructed.*" (emphasis added). The Court in *Johnson* also quoted *Ex Parte Hull*, 312 U.S. 546, 549 (1941) for the proposition that state officials cannot "abridge or impair" a prisoner's right of access to courts. In *Bounds v. Smith*, 430 U.S. at 823-824, this Court held that the right of access encompasses more than merely assuring unrestricted communication between inmates concerning legal matters.

The decision below properly applies the rules of *Johnson, Bounds* and *Hull.* The word "obstruct" is defined by Webster's Third International Dictionary, Unabridged, as ". . . to take an obstacle in or fill with obstacles or impediments to passing . . . to be or come in the way of; hinder from passing, action, or operation."

Can there be any doubt that a threat, by an armed guard with total physical control over a prisoner's environment, to send the prisoner "home in a pine box" if he did not get rid of his legal materials "comes in the way of" his use of those materials? Can there be any doubt that burning one's legal materials is an "obstacle" to the "operation" of the prosecution of a case? Can there be any doubt that life-threatening actions and remarks are "impediments" to the doing of the thing which induces the threat? Clearly, the verdict in this case supports a

violation of the right to access under the decisions of this Court, and the Fifth Circuit was, therefore, supported by precedent from this Court in affirming as to liability.

Bounds and *Johnson* do not require that the obstruction be successful in order to constitute a violation of the right of access. Otherwise, why would the Court use the language "deny *or* obstruct"? To deny implies a successful obstruction; but punishing the exercise of the right and obstructing its exercise is itself a violation. This was recognized by the Fourth Circuit in *Hudspeth v. Figgins*, 584 F.2d 1345 (4th Cir. 1978), which, citing and following *Bounds* and *Johnson*, concluded:

> A threat of physical harm to a prisoner if he persists in his pursuit of judicial relief is as impermissible as a more direct means of restricting the right of access to the courts. *Nor is it necessary that the prisoner succumb entirely or even partially to the threat. It is enough that the threat was intended to impose a limitation upon the prisoner's right of access to the court and was reasonably calculated to have that effect.*

584 F.2d at 1348 (emphasis added). Accordingly, the conclusion reached by the Fifth Circuit in this case is as natural an application of *Bounds* and *Johnson* as was the Fourth Circuit's decision in *Hudspeth*.

Petitioner claims that the Fifth Circuit imposed liability on the basis of "an abstraction." This is merely another way which Petitioner chooses to characterize its argument, *i.e.*, that there can be no deprivation unless the prisoner is actually coerced into ceasing litigation activities.

The result advocated by Petitioner would force a prisoner, while engaging in constitutionally protected activities, to go about this activity while laboring under the apprehension that death or punishment could be the result. The Petitioner's position would have this Court require the Sword of Damocles fall before relief could be had. The controlling decisions of this Court have already effectively rejected this position.

II. THIS CASE IS NOT A "MERE WORDS" CASE AND THEREFORE PETITIONER'S USE OF THE PRECEDENT FROM THAT AREA IS INAPPOSITE.

Petitioner attempts to convert the evidence in this case into an "angry words" case. However, all cases cited in the Petition are completely inapposite to the access to courts question. In *Collins v. Cundy*, 603 F.2d 825 (10th Cir. 1979), no obstruction of access to courts was involved save the refusal of the sheriff to mail a legal letter. However, the letter was clearly not entitled to constitutional protection. In *Arroyo v. Shaefer*, 548 F.2d 47 (2nd Cir. 1977), there was neither allegation nor finding of denial of access to the courts. In *Ellingburg v. Lucas*, 518 F.2d 1196 (8th Cir. 1975), the court merely held that defamation is not a constitutional tort.

Petitioner cites the above cases for the proposition that "verbal abuse alone — including racial invective and threats — does not rise to the level of a constitutional tort." These cases merely stand for the proposition that more than a common-law tort is required for a civil rights act violation. As was said above, much more is involved here because the judgment is based on a verdict finding that Steele's conduct was related to Lamar's litigation

activities, thereby implicating the constitutional right of access to the courts.

III. THE STATEMENT OF THE DECEASED THIRD PARTY REGARDING PETITIONER WAS PROPERLY ADMITTED, AS WAS THE STATEMENT CONCERNING SIMILAR PAST ACTS OF PETITIONER

Petitioner presents no persuasive grounds for granting the petition in connection with the alleged evidentiary errors. The statement of Smith was against interest thus admissible under 804(b)(3) of the Federal Rules of Evidence. Furthermore, the statement meets all the requirements for admissibility under 803(24). The testimony concerning Petitioner's prior threats under identical circumstances falls squarely under rule 404(b).

While maintaining that Petitioner's evidentiary objections are unwarranted, it is clear from the record that regardless of the admission of the above statements, the verdict may be supported by other evidence. Accordingly, it would be a waste of judicial resources to grant the Petition on this ground when the outcome of the case would remain unchanged.

IV. THE FACTS WHICH GIVE RISE TO A CLAIM OF ACCESS DENIAL ARE BEING ADEQUATELY DEVELOPED IN THE LOWER COURTS.

Petitioner claims that Supreme Court guidance is required in this area. However, this Court has given lower courts adequate parameters within which to determine whether an access violation has taken place in *Bounds v. Smith, supra,* and *Johnson v. Avery, supra.*

CONCLUSION

For the above reasons, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Brief for Respondent in Opposition has been mailed, by certified mail, return receipt requested to Leslie A. Benitez, attorney for Petitioner, this 7 day of July, 1983.

Dan S. Boyd